specific markets or market categories." *USTA I*, 290 F.3d at 426. One cannot rationally consider the availability of such alternatives without looking at a geographic market — otherwise, the Commission could find impairment in Manhattan based on conditions in rural Montana.

Those geographic market definitions must reflect the manner in which carriers actually compete. As shown in detail below, when competitors seek to provide mass-market voice service or high-capacity services, they enter broad geographic markets. Although they (rationally) target the most lucrative customers in those markets, the markets in which they compete cannot reasonably be defined as limited to individual loop or transport routes, or to individual wire centers. Instead, as demonstrated on the maps that Verizon submits, they compete *throughout* a broad geographic market, normally an area the size of a Metropolitan Statistical Area ("MSA") and often a larger area, and in some cases competing providers have entered nationwide. *See also* Kahn/Tardiff Decl. ¶¶ 14-15. In an analogous context, the Commission has recognized that, where "MSAs *best reflect* the scope of competitive entry," that geographic area is a "logical basis for measuring the extent of competition." *Pricing Flexibility Order*[20] ¶ 72 (emphasis added). In the impairment context, the Commission must likewise define geographic markets to "best reflect" actual competitive entry.

In defining geographic markets, the Commission also must consider the "error costs (both false positives and false negatives) associated" with its market definition, and explain why those costs "are likely to be lower than the error costs associated with alternative market definitions." *USTA II*, 359 F.3d at 575. The error costs of "false positives" — that is, requiring incumbents to provide UNEs even where there actually is no impairment — are high and include

[20] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*"), *aff'd*, *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

"discouragement of investment in innovation," *id.* at 572, because "unbundling is one of the most intrusive forms of economic regulation," *Triennial Review Order* ¶ 141. And these costs are not mitigated by any countervailing benefits. Where there is no impairment because competitors can compete *without* UNEs, requiring incumbents to provide UNEs undermines facilities-based competitors and generates only "completely synthetic competition" that does not "fulfill Congress's purposes" in enacting the 1996 Act. *USTA I*, 290 F.3d at 424. In contrast, any harm from "false negatives" — that is, findings of no impairment for a broad geographic market that might contain pockets of areas where competitors are impaired — is mitigated because the absence of a UNE obligation preserves incentives to invest in newer, more efficient facilities (which might eliminate any lingering impairment) and avoids the administrative costs inherent in the provision of UNEs.

i. For high-capacity facilities, the evidence Verizon presents demonstrates that competitors do not enter discrete route-by-route markets. Instead, competing carriers are providing service throughout the MSAs they have entered.[21] This is because the demand for high-capacity facilities is highly concentrated — both in particular MSAs (and areas within MSAs) and among particular customer groups — and competitors are providing service wherever this demand exists. *See infra* pp. 36-65. Using MSAs not only is consistent with the requirement that the market definition reflect the scope of competitive entry, but also satisfies the D.C. Circuit's command that the Commission select a market definition that minimizes error costs. MSAs are sufficiently large and few in number that they avoid the overwhelming

[21] The fact that competing carriers may not have deployed facilities on every single route within these MSAs is irrelevant, both because the Commission "must consider the availability of tariffed ILEC special access services," *USTA II*, 359 F.3d at 577, and also because it must consider "facilities deployment along similar routes when assessing impairment," *id.* at 575.

granularity of wire-center-by-wire-center or route-by-route analyses.[22] Even aside from the administrative costs of such an inquiry, slicing the market so narrowly is likely to increase the incidence of false positives, as it becomes harder to identify the common features that make competition possible in broader regions than the specific locations where actual competition is occurring today. On the other hand, MSAs are smaller in size than other potential markets, such as LATAs or entire states, minimizing the chance of false negatives and confining them to small pockets within the MSA.

ii. For mass-market switching, the evidence Verizon presents demonstrates that competitors offer services such as VoIP and wireless on a nationwide basis. Thus, while competing providers unquestionably operate throughout the major MSAs in Verizon's operating territory, they have not entered markets on an MSA-by-MSA basis — let alone on a wire-center-by-wire-center basis — but instead are rolling out their competitive offerings across the country. Given the manner in which this competition is occurring, there would be no benefit to adopting a geographic market smaller than a nationwide market.

b. The Commission also must make "impairment findings [on a] service-by-service" basis. *CompTel*, 309 F.3d at 12, 14. Indeed, in *USTA II*, the D.C. Circuit made clear that *CompTel* "emphatically h[o]ld[s] that the Act [does] not bar a service-by-service analysis of impairment." 359 F.3d at 592. On the contrary, it is "*far from obvious*" that the Commission has the authority, "without an impairment finding as to [particular] services, to require that ILECs provide [UNEs] for such services on an unbundled basis." *CompTel*, 309 F.3d at 14 (emphasis added). Applying that principle, the court held in *USTA II* that, because competitors pointed to

[22] While there are approximately 360 MSAs, there are approximately 7,000 wire centers in Verizon's serving territory alone, and tens of millions of high-capacity loop and dedicated transport routes.

no evidence of impairment in either the wireless or long-distance markets, it would be contrary to the 1996 Act for the Commission to enable carriers to obtain UNEs for use in providing wireless or long-distance service. *See* 359 F.3d at 576-77, 592-93. Likewise, as discussed above, the D.C. Circuit has held that the Commission cannot require unbundling for the provision of broadband services, because that market is already competitive. *See id.* at 578-85; *USTA I*, 290 F.3d at 428-29. As Verizon demonstrates below, there are other market segments — including the markets for large enterprise customers and for entrance facilities — where evidence of actual competition demonstrates that competitors are not impaired without UNE access to high-capacity facilities. This evidence compels a finding of no impairment for these markets, no matter how the Commission rules on the more general question whether there is impairment in certain geographic markets for high-capacity facilities.

8. There are numerous factors that *cannot* be relied on as a basis for finding impairment, including issues created by regulators (such as below-cost retail rates), factors unrelated to natural monopoly characteristics of the market, and factors that could be addressed directly or through means other than mandating unbundling.

a. The Commission cannot rely on low basic-service rates as a source of impairment. Below-cost retail rates have nothing to do with natural monopoly or whether competitors can reasonably duplicate the facilities at issue, as the D.C. Circuit has twice held. As the court explained, such regulated rates are not related to "structural features that would make competitive supply wasteful." *USTA II*, 359 F.3d at 573. Indeed, the court found that, in the *Triennial Review Order*, the Commission made "no attempt to connect" low retail rates "with any . . . purposes of the Act (other than, implicitly, the purpose of generating 'competition,' no matter how synthetic)." *Id.* Where regulators have kept retail rates low, there is no sense in

which the absence of "unbundling can be said to impair competition in such markets, where, given the ILECs' regulatory hobbling, any competition will be wholly artificial." *USTA I*, 290 F.3d at 422.

b. The prohibition on deeming low retail rates a source of impairment is a specific example of a more general rule. In considering barriers to competition that might prevent an efficient competitor from entering a market without using a UNE (or any UNEs at all), the Commission may consider "only costs related to *structural* impediments to competition" that are "linked (in some degree) to natural monopoly." *USTA II*, 359 F.3d at 572 (emphasis added); *USTA I*, 290 F.3d at 427. Alleged sources of impairment that can be traced to the decisions of regulators — including the establishment of low retail rates — do not qualify as structural impediments. The Commission also may not rely on cost disparities "faced by virtually any new entrant in any sector of the economy, no matter how competitive the sector," but must instead limit its consideration to factors that apply over the long term and "over the entire extent of the market." *USTA I*, 290 F.3d at 426-27 (internal quotation marks and emphasis omitted). Unless an alleged barrier to entry meets these criteria, as the D.C. Circuit has held, "there is no particular reason to think that the element is one for which multiple, competitive supply is unsuitable." *Id.*

c. Finally, where the Commission can address an alleged source of impairment directly, or through narrower alternatives, the Commission is prohibited from mandating unbundling. Thus, in *USTA II*, the D.C. Circuit held that the Commission had improperly mandated unbundling of mass-market circuit switching when the record demonstrated that "narrower alternative[s]," with "fewer disadvantages," could address the specific basis on which the Commission made its provisional finding of impairment. 359 F.3d at 571. Indeed, the court

held that it is "irrational" — and, therefore, unlawful — to require unbundling in such circumstances. *Id.* Similarly, in the *Triennial Review Order*, the Commission based its impairment finding for high-capacity facilities, in part, on a determination that competitors face barriers in "gaining building access from owners of multiunit premises." *E.g.*, *id.* ¶ 320. Even aside from the fact that the evidence indicates that competitors are successfully gaining access to such buildings — as well as the fact that this is not a cognizable concern in a lawful unbundling inquiry because there is no sense in which this relates to any natural monopoly characteristics of the market — the appropriate response would be to address the issue directly, not to mandate unbundling. Thus, as the Commission itself has done in other instances, the direct answer to this concern would be to require building owners to provide competitors with access.[23]

II. HIGH-CAPACITY UNES

Under the analytical framework the Commission is bound to apply, the evidence demonstrates that competing carriers are capable of successfully providing high-capacity services *without using unbundled elements*. The market facts show that, wherever there is demand for high-capacity services, competing providers are competing successfully using a combination of their own or other alternative facilities and special access services purchased from incumbent LECs. Competing providers are using these alternatives to UNEs to provide high-capacity services to customers of all shapes and sizes, in both large and small markets across the country. Competing providers have in fact been so successful that they lead in the

[23] *See, e.g.*, First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000).

head-to-head competition at the retail level for a number of the most significant categories of high-capacity services and customers.

Because alternative providers are competing where there is demand, and are successfully serving customers without the need for unbundled elements, the question whether competing carriers are impaired without access to UNEs — which, as discussed above, requires a determination of whether high-capacity services are "suitable for competitive supply" — must be answered in the negative. *USTA II*, 359 F.3d at 571. Where competing carriers already are successfully providing high-capacity services using a combination of their own facilities, facilities leased from third parties, and special access, there is no impairment and unbundling cannot be required. Based on the evidence presented below, the Commission may not require unbundling of high-capacity loops or dedicated transport, including dark fiber loops. This is true both for high-capacity facilities in general and for several categories of high-capacity customers, services, facilities, and geographic areas for which competition is especially intense.

This is all the more true given the enormous "costs of mandatory unbundling" that would result from imposing an unbundling obligation on high-capacity facilities in these circumstances. *Id.* at 576. As described below, competition in the provision of high-capacity services began more than a decade before the 1996 Act and has grown intensely competitive since that time, with competing carriers deploying their own facilities, leasing them from alternative providers, and supplementing these facilities with ILEC special access as needed. Because this competition emerged entirely without access to UNEs, requiring unbundling would risk snatching defeat from the jaws of victory. As both the Commission and the D.C. Circuit have recognized, requiring unbundling of high-capacity facilities, where there already is a "mature source of competition" that has emerged without UNEs, threatens to "undercut the market position of

many facilities-based competitive access providers . . . with potentially severe consequences." *Supplemental Order Clarification* ¶ 18; *see CompTel*, 309 F.3d at 16 (upholding the Commission's determination given the Supreme Court's finding that the 1996 Act "manifest[s] a preference for facilities-based competition").

A. Legal Considerations Regarding the Impairment Analysis for High-Capacity UNEs

In the *Triennial Review Order*, with respect to high-capacity loops and dedicated transport, including dark fiber loops and transport, the Commission defined the relevant geographic market for determining impairment as a point-to-point route. *See id.* ¶¶ 307, 335, 360, 410. The Commission then established "triggers" for determining that competitors are not impaired without UNE access to high-capacity facilities on a given route, based on the existence of multiple competitive providers on that route, and delegated to the states the responsibility for determining where the triggers are met. *See id.* ¶¶ 330, 339, 400, 417. Recognizing that there are other instances where a "customer location *could* be economically served by competitive carriers" and competitors therefore are not impaired, even where the triggers are not met, the Commission also delegated to states the task of determining where this is the case. *See id.* ¶¶ 335, 410 (emphasis added). Although the Commission provided "no guidance" on how state commissions should weigh the various factors relevant to determining whether competition is possible on a given route, *id.* ¶ 425 n.1300, it instructed the states to focus on each individual route in isolation, as though each route were its own unique market, *see id.* ¶¶ 328, 401.

The Commission refused to consider evidence that competitors are successfully providing high-capacity services using special access purchased from incumbents. *See, e.g., id.* ¶ 102. Indeed, this was part of the Commission's exclusive focus on whether competitors "can provide

retail [or wholesale] services over non-incumbent facilities," and its general refusal to consider whether competition is possible "us[ing] incumbent LEC resold or retail tariffed services." *Id.* ¶¶ 101-102. And, despite the Commission's findings of no impairment with respect to OCn loops and transport and even with respect to multiple DS3 loops and transport on a single route, *see id.* ¶¶ 315, 324, 388-389, the Commission nonetheless required incumbents to unbundle dark fiber loops and transport, *see id.* ¶¶ 311, 381. The Commission found impairment on the basis that dark fiber enables CLECs to compete "more efficiently" than obtaining lit fiber from an ILEC and provides lower-cost access to OCn-capacity facilities than self-provisioning. *Id.* ¶¶ 311 n.910, 315 n.931, 383.

In *USTA II*, the D.C. Circuit vacated the Commission's finding of impairment, nationwide, for high-capacity loops, dedicated transport, and dark fiber. The court specifically noted that, "as with mass market switching, the [*Triennial Review Order*] itself suggests that the Commission doubts a national impairment finding [for high-capacity facilities] is justified on this record," given the evidence of actual competition for high-capacity facilities. *USTA II*, 359 F.3d at 574. In light of the D.C. Circuit's holdings, discussed above, confirming that the impairment inquiry turns on whether competition is possible — not on whether there is an actual competitor, let alone multiple competitors, serving a particular route — the existence of actual competition in numerous markets demonstrates that competition is possible without UNEs in those markets and in all similarly situated markets.

The D.C. Circuit also explicitly rejected the two ways in which the Commission had defined (and limited) the scope of its impairment analysis with respect to these facilities. *First*, the court found that the Commission had improperly defined individual loop and transport routes as unique markets. Instead, the court stressed that the Commission is required to adopt "a

sensible definition of the markets in which deployment" occurs and must consider "facilities deployment along similar routes when assessing impairment." *Id.* at 574, 575. *Second*, the D.C. Circuit held that the Commission "must consider the availability of tariffed ILEC special access services when determining whether would-be entrants are impaired." *Id.* at 577; *see id.* (Commission cannot "omit consideration of such [ILEC-provided] alternatives in its impairment analysis"). The court held, moreover, that, where "competitors have access to necessary inputs [through special access] at rates that allow competition not only to survive but to flourish," the answer is clearly no, and there is no "need for the Commission to impose the costs of mandatory unbundling." *Id.* at 576. Indeed, in such circumstances "competitors cannot generally be said to be impaired by having to purchase special access services from ILECs, rather than leasing the necessary facilities at UNE rates." *Id.* at 592.

These two bases for rejecting the Commission's impairment analysis — as well as the court's vacatur of all of the Commission's attempts to sub-delegate to state commissions the authority to make impairment determinations — demonstrate that the D.C. Circuit vacated the Commission's rule requiring unbundling of high-capacity loops as well as the Commission's impairment determinations as to those loops. Although the Commission has assumed this to be the case, *see NPRM* ¶ 8 n.29, there can be no serious dispute that the Commission, in promulgating final rules, cannot simply reinstitute its prior impairment findings as to high-capacity loops, as some have claimed.[24] First, the D.C. Circuit used "transport" as a generic term, which it defined to include high-capacity "transmission facilities dedicated to a single

[24] *See* Emergency Petition for Expedited Determination that Competitive Local Exchange Carriers Are Impaired Without DS1 UNE Loops, WC Docket No. 04-313 & CC Docket No. 01-338 (FCC filed Sept. 29, 2004).

customer or carrier" — that is, loops and transport. *USTA II*, 359 F.3d at 573.[25] Second, the D.C. Circuit vacated all "portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements," *USTA II*, 359 F.3d at 564, 568, and the Commission *did* "delegate to the states the authority to . . . determine customer locations where competitive carriers are not impaired without access to incumbent LEC unbundled DS1s," based on the "availability of wholesale competitive alternatives," *Triennial Review Order* ¶ 327.[26] Third, the D.C. Circuit's two independent grounds for vacating the Commission's provisional impairment findings apply equally to high-capacity loops and transport: the Commission's decisions to ignore both "the availability of tariffed ILEC special access services" and "facilities deployment along similar routes." *USTA II*, 359 F.3d at 575, 577. In sum, those who assert that the Commission need not revisit its impairment findings for high-capacity loops are making the implausible claim that the D.C. Circuit — despite vacating virtually identical impairment findings and addressing *every* other challenge to the Commission's rules raised by any party — affirmed the Commission's impairment findings for high-capacity loops *sub silentio*.

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[25] Although some have claimed that the D.C. Circuit's definition of transport quotes directly from the Commission's definition of interoffice transport, the court did not, in fact, quote the *Triennial Review Order* or cite any paragraph as a basis for its definition. The court, moreover, did not define "transport," as used in the opinion, as limited to facilities "use[d] for transmission among incumbent LEC central offices and tandem offices," which is a key distinction between transport (which connects switches to other switches) and loops (which connect switches to end-user customers). *Triennial Review Order* ¶ 361.

[26] The Commission's Competition Policy Division has agreed that, as a result of *USTA II*, "state commissions no longer retain the authority delegated to them by the Commission to make impairment decisions." Order, *Request for Stay of Order for the July 2, 2004 Deadline for State Commission Determinations of Impairment Pursuant to the Triennial Review Order*, 19 FCC Rcd 12347, ¶ 1 (Chief, CPD 2004) (dismissing as moot petition to stay deadline for completion of state commission impairment proceedings).

B. High-Capacity Services Are Uniquely Suited to Competitive Supply

In order to formulate "a sensible definition" of the high-capacity market and its various components, it is necessary to begin with the recognition that this market is characterized by a number of demand- and supply-side characteristics that make high-capacity services uniquely suited to competitive supply.

As an initial matter, the demand for high-capacity services is highly concentrated *geographically*, which as the Commission has recognized provides greater opportunities for competitors. *See Triennial Review Order* ¶¶ 205, 375. In Verizon's region, nearly *80 percent* of the demand for high-capacity special access services is concentrated in a little over *8 percent* of its wire centers (or roughly 532 out of nearly 7,000 total). *See* Declaration of Judy Verses, Ronald Lataille, Marion Jordan and Lynelle Reney ¶ 8 & Exh. 1B ("Verses/Lataille/Jordan/Reney Decl.") (Attachment B).[27] These wire centers, in turn, are highly concentrated in the largest metropolitan areas — more than *86 percent* of the 532 wire centers where demand is concentrated are located in the top-40 MSAs in Verizon's serving area with the largest amount of high-capacity demand. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 8 & Exh. 2B. Moreover, within each of those wire centers, demand is further concentrated in large office buildings and business parks. *See 2004 Fact Report* at III-9 to III-10; *see also Triennial Review Order* ¶ 298.

[27] Other Bell companies similarly report that a high percentage of their demand for high-capacity services is concentrated in a small percentage of their wire centers. *See UNE Fact Report 2004* at III-8 & Table 5, WC Docket No. 04-313 & CC Docket No. 01-338 (FCC filed Oct. 4, 2004) ("*2004 Fact Report*"). *See also Pricing Flexibility Order* ¶ 106 (noting that, "with respect to dedicated transport and other special access services, demand for these channel terminations may be fairly concentrated").

Demand for high-capacity services also is concentrated among those *customers* that generate both the relatively high volumes of traffic that warrant use of dedicated, high-capacity facilities and the correspondingly high revenues. *See WorldCom, Inc. v. FCC*, 238 F.3d 449, 453 (D.C. Cir. 2001) ("Most users of special access services are companies with high call volumes.").[28] Users of high-capacity services are, therefore, an attractive customer segment that has been heavily targeted by competing providers when they enter a new market area. *See Triennial Review Order* ¶ 303. These users were in fact the first segment of the local market to be targeted by competing carriers; competitive entry began more than a decade before the 1996 Act by carriers that were then known as competitive access providers or "CAPs." As the Commission has noted, these companies offered "access services to large business customers in the central business districts of many major cities."[29] Competing carriers have pursued the same strategy since the 1996 Act, and today the number of CLEC networks in an MSA is strongly correlated with the size of an MSA (which, in turn, is highly correlated with business activity). *See 2004 Fact Report* at III-8 & Fig. 1. And as discussed in more detail below, within these

[28] *See also* Corrected Brief for Federal Communications Commission at 4, *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395, *et al.* (D.C. Cir. filed Sept. 12, 2000) ("Because special access services employ dedicated facilities, special access is typically used by IXCs and large businesses with high traffic volumes."); Brief of MCI WorldCom, Inc., *et al.*, as Petitioners and Supporting Intervenors at 3, *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395, *et al.* (D.C. Cir. filed Sept. 8, 2000) ("Special access, used generally by business customers who have a high volume of calls, is accomplished 'via a private, dedicated line . . . running from the customer to the IXC.'") (citation omitted).

[29] Notice of Proposed Rulemaking and Notice of Inquiry, *Expanded Interconnection with Local Telephone Company Facilities*, 6 FCC Rcd 3259, ¶ 2 (1991) ("[F]iber-based carriers, sometimes described as Competitive Access Providers (CAPs), now offer access services to large business customers in the central business districts of many major cities."); *see also* Order, *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd 7507, ¶ 210 (1990) ("[N]ew facilities-based competition has emerged in the high capacity special access market.").

MSAs, competitors with fiber networks target even more precisely the specific buildings where that demand is concentrated. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 44 & Exh. 6; *2004 Fact Report* at III-8 to III-9 & Table 6.

Finally, once a competitor decides to offer high-capacity services in a particular market area, it can provide such services *throughout* that area, wherever demand exists. As discussed further below, competing carriers can provide high-capacity services using competitive facilities or special access services purchased from the incumbent (either exclusively or in combination). This means that once a competing carrier enters the market it can immediately decide to serve the entire market, which further increases its ability to achieve economies of scale. Verizon has developed maps for the top-40 MSAs in Verizon's territory in which special-access demand is most heavily concentrated, which demonstrate that this is precisely what competing carriers are now doing.[30]

The summary map for each of the top-40 MSAs, in each case labeled Map A, plots specific locations where competing carriers are providing high-capacity services to customers using either special access or alternative fiber facilities in those MSAs. Although the locations served by only a subset of all competing carriers are shown on the maps, they nonetheless show that competitors are providing high-capacity services throughout these MSAs — primarily in the downtown areas, where demand is most highly concentrated, but also in more far-flung areas, to the extent demand also exists in those locations. The summary maps further show that

[30] These maps are organized by MSA. For the top-20 MSAs, there are five maps, referred to as Maps A through Maps E. For the second 20 MSAs, there are four maps, referred to as Maps A through Maps D. For both sets of MSAs, Maps A, B, and C are comparable. For the second 20 MSAs, Maps D combine the data that are depicted separately in Maps D and E for the top-20 MSAs. The Verses/Lataille/Jordan/Reney Declaration details the source data used to compile the maps. *See* Verses/Lataille/Jordan/Reney Decl. ¶¶ 9-30, 48-50. The maps themselves are contained in Attachment H to these comments.

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competitors are doing so using *both* their own or other alternative facilities (the purple squares on the map) and Verizon's special access service (the red triangles on the map).

Verizon's data further show that all kinds of carriers are capable of competing in this manner. As the Declaration of Claire Beth Nogay explains, both smaller carriers such as **[BEGIN CLEC PROPRIETARY]**

[END CLEC PROPRIETARY], as well as larger carriers such as **[BEGIN CLEC PROPRIETARY]** **[END CLEC PROPRIETARY]**, are competing throughout Verizon's service area in the top-40 MSAs using special access services or a combination of special access and these carriers' own facilities or facilities leased from third parties. *See* Declaration of Claire Beth Nogay ¶ 20 ("Nogay Decl.") (Attachment C). Some carriers and a new breed of facilities aggregators have even begun using special access to begin offering wholesale services to other competing providers, often at substantial discounts from what Verizon offers its retail customers. *See 2004 Fact Report* at III-19 to III-21; Declaration of Claudia Cuddy ¶ 16 ("Cuddy Decl.") (Attachment E).[31]

The experience of Verizon's Wholesale Markets Group also demonstrates that competing carriers have multiple options to compete, and that Verizon is just one of the available alternatives. Verizon's Wholesale Markets Group provides high-capacity special access services to carriers that use those services to serve large, medium, and small business end users. *See* Nogay Decl. ¶ 3. In Verizon's experience, many of its carrier-customers have their own facilities

[31] *See also* McGraw Communications Press Release, *McGraw Communications Signs Multi-Million Dollar Wholesale Agreement with PAETEC Communications*, Inc. (Aug. 16, 2004) (announcing agreement where McGraw will buy special access T1 circuits from PaeTec, which in turn obtains them from Verizon as special access).

and can self-provision facilities to serve their customers. *See id.* ¶¶ 4, 30. Typically, the carrier-customers will challenge Verizon to provide special access at a price and service level that can beat their cost to self-provision. *See id.* Even for those carriers that do not construct their own facilities, Verizon also must compete with alternative providers on both price and service, and will lose business if it fails to do so. *See id.*

Finally, Verizon's own experience as a competing carrier outside its region provides further proof of the ability of competing carriers to rely on a variety of high-capacity alternatives to provide service throughout a given market. When Verizon decides to enter a new out-of-region market, it begins by obtaining information from selected competing carriers about the availability and price of competitive local access facilities. *See* Cuddy Decl. ¶¶ 4-19. Based on the information it receives and facilities it is able to obtain, Verizon establishes points of presence in certain markets and then begins offering high-capacity voice and data services to customers using a combination of its own facilities, non-ILEC fiber facilities obtained through commercial arrangements, and ILEC special access. *See id.* ¶¶ 5-7. In each market, Verizon selects a primary carrier that must be able to supply all of the facilities necessary to meet Verizon's needs, either with the primary carrier's own facilities or facilities that the primary carrier obtains from an alternative provider. *See id.* ¶ 20. In some markets Verizon also selects a secondary carrier that must meet these same criteria. *See id.*

In each of the 28 out-of-franchise markets that Verizon has sought to enter, it has received proposals from at least two separate CLECs; in 26 of the markets it received proposals from three or more CLECs; and in 21 of the markets it received proposals from four or more CLECs. *See id.* ¶ 8, Table 1. Based on the proposals that it received, Verizon was able to determine that (1) for *all* of the locations, there was at least one CLEC that was capable of

providing strong coverage in areas of highly concentrated demand; (2) in the largest markets with the greatest total telecommunications spending, there were at least two CLECs able to provide service; and (3) in smaller markets, there also were frequently two CLECs that provided strong coverage in areas of highly concentrated demand. *See id.* ¶¶ 12, 14, 15. Verizon was further able to determine that in all of the 28 markets, the prices offered by the CLEC providers were competitive with the ILEC's comparable service, and that there were no unique technical or operational impediments that Verizon would face by purchasing from one or more of the CLECs as opposed to the ILEC. *See id.* ¶¶ 13, 17-19.

Based on Verizon's evaluation, it determined that in *all* of the 28 out-of-franchise markets, at least one CLEC was capable of meeting its needs. *See id.* ¶ 12. Verizon accordingly selected a CLEC to be either its primary carrier in the vast majority of those markets (19 of the 28), and in half of the markets where Verizon also chose a secondary provider (3 of 6) it also selected a CLEC for that role. *See id.* ¶ 21. Verizon's first-hand experience accordingly provides additional evidence that competition in the provision of high-capacity services is possible without access to high-capacity UNEs.

C. Competition for High-Capacity Facilities and Services

The market for high-capacity services is not merely suited for competitive supply, but has in fact attracted extensive competition. As the Commission has previously recognized, facilities-based competition first emerged nearly two decades ago. *See, e.g.*, *Triennial Review Order* ¶ 44. By the time of the *Triennial Review* proceeding, alternative high-capacity facilities were widely available, and that is even more true today. Moreover, competing carriers have been using special access services to compete successfully, a fact the Commission previously ignored in its impairment analysis but must consider now.

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1. Competitors Are Capable of and Are Using Alternative High-Capacity Transport Facilities

Competing providers have deployed extensive fiber facilities throughout major metropolitan areas and business parks focusing on the areas where demand for high-capacity services is concentrated, and these providers are capable of and are using those facilities to provide transport services.

The Commission has previously acknowledged that competing providers "have deployed significant amounts of fiber transport facilities to serve local markets." *Triennial Review Order* ¶ 370; *see also id.* ¶ 398. According to New Paradigm Resources Group's *CLEC Report 2004* — a source on which the CLECs' own trade association relies for competitive data[32] — competing providers have now deployed at least one network in at least 140 of the top-150 MSAs, and an average of roughly 19 networks in each of the top-50 MSAs. *See 2004 Fact Report* at III-3. These networks consist of approximately 324,000 route miles of fiber. *See id.* at III-3 to III-4 & Table 1. For example, AT&T operates 21,000 route miles of local fiber in approximately 70 MSAs and Time Warner Telecom operates 12,247 route miles of local fiber (637,081 local fiber miles) in approximately 41 MSAs. *See id.* at III-4 & Table 1.[33]

Data regarding the markets served by Verizon confirm that competing providers have deployed fiber networks wherever high-capacity demand is concentrated and that these networks are capable of and are being used to provide transport services. Verizon has compiled information from two highly reliable sources of data, as described in the attached

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[32] *See, e.g.*, ALTS, *The State of Local Competition 2004* at 7 (July 2004), *available at* http://www.alts.org/Filings/2004%20Annual%20Report.ppt.

[33] *See also* Nogay Decl. ¶ 9; Verses/Lataille/Jordan/Reney Decl., Exh. 4A; Time Warner Telecom Press Release, *Time Warner Telecom Announces Second Quarter 2004 Results* (Aug. 4, 2004).

Verses/Lataille/Jordan/Reney Declaration. *First*, Verizon performed physical inspections of selected central offices with high demand levels for high-capacity services to identify those in which competing providers have obtained fiber-based collocation. *See* Verses/Lataille/Jordan/Reney Decl. ¶¶ 9-14. The Commission has previously endorsed fiber-based collocation as a means to evaluate the presence of competitive transport, *see Pricing Flexibility Order* ¶ 81, and the D.C. Circuit has upheld that determination, *see WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).[34] Both the Commission and the Court have also recognized, however, that fiber-based collocation undoubtedly *understates* the true scope of competitive fiber transport, because it "fails to account for the presence of competitors that . . . have wholly bypassed incumbent LEC facilities." *WorldCom*, 238 F.3d. at 462 (quoting *Pricing Flexibility Order* ¶ 95). Analyzing the presence of competitive fiber based on fiber-based collocation also fails to account for the fact that, increasingly, central offices are not the only or even largest points of traffic aggregation, and are instead being replaced by collocation or data hotels, which competing carriers also routinely serve with their fiber networks. *See 2004 Fact Report* at III-9 & Table 6; Nogay Decl. ¶ 12.

Second, Verizon obtained third-party data on *known* competitive fiber routes from GeoTel — an outside consultant that is a leading provider of information related to telecommunications geography. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 15. GeoTel maintains data on the fiber networks of approximately 85 carriers in more than 100 MSAs — much of

[34] In the *Triennial Review Order*, the Commission attempted to distinguish this precedent, claiming that the "competition in some parts of a market may be sufficient to constrain prices, but insufficient to demonstrate a lack of impairment." *Triennial Review Order* ¶ 104. But this supposed distinction is contrary to the 1996 Act's language and purpose. Competitors cannot be impaired within the meaning of § 251(d)(2) where there is enough facilities-based competition to "constrain prices," because in such circumstances there is no "reason to think doing so would bring on a significant enhancement of competition." *USTA I*, 290 F.3d at 429.

which is derived from the carriers themselves. *See id.* Competing providers and incumbent local exchange carriers alike use this data for marketing purposes and/or to determine the availability of telecommunications services, including high-capacity transport, in a given market. *See id.* ¶ 16. Again, however, although GeoTel's data are highly reliable, they likely understate the extent of competitive fiber deployment, because GeoTel does not always obtain information about new fiber deployment as soon as it occurs and does not always have data for all competing providers that have deployed fiber in a given area. *See id.* ¶ 17.

The data from these two sources are presented in Maps B through D. Maps B provide a high-level view of the known competitive fiber that has been deployed in each of Verizon's top-40 MSAs with the highest concentration of demand for high-capacity services. These maps plot three types of data in each MSA: the central offices that account for 80 percent of demand for high-capacity services in Verizon's region; the subset of those central offices in which competing providers have deployed known fiber; and the known fiber routes of competitive providers. These maps show that there is a strong correlation between the presence of competitive fiber and the offices in which demand for high-capacity services is concentrated. In particular, competing providers have obtained fiber-based collocation in an overwhelming majority of the central offices that are among those that account for 80 percent of Verizon's demand for high-capacity services, and the known fiber routes these providers have deployed are concentrated in these same wire centers. Verizon's physical inspections and the GeoTel data show that there is competitive fiber in nearly two thirds of the offices in those MSAs that are among those that account for 80 percent of the demand for high-capacity special access services

in Verizon's region. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 18 & Exh. 4B.[35] Where competitive fiber is present within a wire center, it is reasonable to assume that competing carriers are capable of using that fiber to provide transport between that wire center and other wire centers with competitive fiber. This does not mean to suggest there actually is fiber directly between each of these wire centers, but it does show where, in the court's word, it is "possible" to establish connections between wire centers. This is so because of the way that competing carriers deploy fiber. As the Commission has recognized, when competing carriers enter a market, they "typically deploy fiber rings" that "may connect several incumbent LEC central offices in a market" as well as other points of traffic aggregation such as IXC POPs, data hotels, and the networks of other competitive providers. *Triennial Review Order* ¶ 370; *see also 2004 Fact Report* at III-31. Carriers use these rings to "aggregate end-user traffic for backhaul to their switch, or other equipment." *See Triennial Review Order* ¶ 370.[36] Thus, each wire center that contains competitive fiber is linked back to a central point (such as a switch), which in turn connects to other wire centers with competitive fiber, thereby enabling the carrier to connect all the extremities together at single central location, rather than by providing a web of direct connections between them. The Commission has accordingly recognized that when competing carriers provide transport between two or more wire centers, they do not necessarily connect

[35] The percentage of wire centers with competitive fiber in those MSAs may in fact be higher, however, because Verizon did not inspect every office within those MSAs, and inspected only 480 offices out of the nearly 7,000 it serves. *See id.* ¶ 11.

[36] *See also Triennial Review Order* ¶ 361 ("Competing carriers generally use interoffice transport as a means to aggregate end-user traffic . . . by using dedicated transport to carry traffic from their end users' loops, often terminating at incumbent LEC central offices, through other central offices to a point of aggregation.").

those offices directly, but may also do so *indirectly* — for example, by using their own network or another carrier's network as an intermediary point.[37]

Maps D reflect the known fiber routes in the downtown portions of Verizon's top-40 MSAs. The fiber routes shown in these maps provide further confirmation that there is a high correlation between competitive fiber deployment and the areas where high-capacity demand is concentrated. Here, too, however, while the information on known fiber routes is reliable, it is not necessarily complete and may not include all competitively deployed fiber. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 17. In fact, Verizon's studies of the competing carriers that have obtained fiber-based collocation reveal that there are a number of carriers that have fiber in the top-40 MSAs but who are not included in GeoTel's data. *See* Nogay Decl. ¶ 11; Verses/Lataille/Jordan/Reney Decl., Exhs. 3A-3B.

Although Verizon's maps do not separately identify all the individual carriers that have deployed fiber in the top-40 MSAs, that list is extensive. The data that Verizon obtained from GeoTel show that there are an average of 10 competing providers with fiber in each of Verizon's top-20 MSAs. *See* Verses/Lataille/Jordan/Reney Decl., Exh. 4. Across the top-40 MSAs, there are more than 80 different providers that have deployed fiber in Verizon's service territory. *See id.* In some MSAs, there are more than 20 competitive fiber providers. *See* Nogay Decl. ¶ 9. The list of providers that have deployed fiber includes competing service providers such as

[BEGIN VENDOR PROPRIETARY]

[37] *See, e.g., Triennial Review Order* ¶ 401 (competitive transport "do[es] not have to mirror the network path of the incumbent LEC," but may instead use more efficient arrangements, including routing traffic through the CLEC's "intermediate" facilities); 47 C.F.R. § 51.319(e) ("A [dedicated transport] route between two points (*e.g.*, wire center or switch 'A' and wire center or switch 'Z') may pass through one or more intermediate wire centers or switches (*e.g.*, wire center or switch 'X').").

[END VENDOR PROPRIETARY]; wholesale suppliers such as **[BEGIN VENDOR PROPRIETARY]** **[END VENDOR PROPRIETARY]**; cable companies such as **[BEGIN VENDOR PROPRIETARY]** **[END VENDOR PROPRIETARY]**; and utilities such as **[BEGIN VENDOR PROPRIETARY]** **[END VENDOR PROPRIETARY]**. *See id.*; *see also* Verses/Lataille/Jordan/Reney Decl., Exh. 4A.

2. Competitors Are Capable of and Are Using Alternative High-Capacity Loop Facilities

The extensive fiber networks that competing providers have deployed also are capable of and are being used to provide high-capacity loops to buildings in which there is concentrated demand for high-capacity services.

a. The Commission has recognized that "competitive LECs have deployed fiber that enables them to reach customers entirely over their own loop facilities," and that they have "built fiber loops to buildings that carry a significant portion of the competitive traffic in certain MSAs." *Triennial Review Order* ¶ 298; *see also id.* ¶ 315. When competing carriers deploy fiber rings, they are "often deployed to maximize the ability of competitors eventually to deploy loop facilities to connect directly buildings and customers to the transport fiber ring, without accessing unbundled loops at an incumbent LEC central office." *Id.* ¶ 370.

According to competing providers themselves, competitive fiber now provides *direct* connections to approximately 32,000 office buildings — buildings that are connected to a

CLEC's fiber ring with the CLEC's own fiber. *See 2004 Fact Report* at III-4, Table 1.[38] CLECs also serve several hundred thousand additional buildings on their fiber networks using *indirect* connections — where the building is connected to a CLEC's fiber ring using a facility leased from an alternative provider, including special access obtained from an ILEC. *See id.* at III-3. One of those CLECs — Time Warner Telecom, which serves 17,500 buildings on its network (4,500 through direct connections, plus an additional 13,000 buildings through indirect connections) — claims that, in some markets, its fiber network alone may connect to *more* buildings than BOC fiber.[39]

Verizon has compiled information demonstrating that competing providers in Verizon's top-40 MSAs have connected their fiber to buildings where high-capacity demand is concentrated, just as these providers have done in markets throughout the country. Verizon has again obtained two sources of data that prove this, which are described in the Verses/Lataille/Jordan/Reney Declaration.

First, Verizon obtained third-party data identifying the office buildings that competing carriers are serving with fiber facilities. Verizon obtained the locations of these "lit" buildings from two sources that are generally relied upon in the industry: Universal Access, an independent broker of high-capacity services for telecommunications service providers and end-user customers, and GeoResults, Inc., an industry consultant to telecommunications equipment

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[38] A few carriers – such as Level 3 – have been willing to make public the addresses they serve with fiber. *See* Nogay Decl. ¶ 14.

[39] *See* E. Gubbins, *A Conversation with Time Warner Telecom's Mike Rouleau*, TelephonyOnline.com (Oct. 29, 2003) ("While [RBOCs] have lot[s] of fiber deployed, I don't know that they have more buildings connected than we do in all cases. In certain markets they may; in others they may not."), *available at* http://www.telephonyonline.com/ar/telecom_conversation_time_warner; Time Warner Telecom Press Release, *Time Warner Telecom Announces Second Quarter 2004 Results* (Aug. 4, 2004).

vendors and service providers. *See* Verses/Lataille/Jordan/Reney Decl. ¶¶ 19-30. GeoResults used Telcordia's industry-standard Common Language database to identify buildings in which CLECs have deployed fiber-enabled network equipment, which is an indicator that the CLEC is using fiber to serve customers in that building. *See id.* ¶¶ 20-23. As a broker of high-capacity services, Universal Access maintains an extensive database on the availability of high-capacity facilities that is generally relied upon in the industry, including the footprints of competitive fiber networks and the buildings served by those networks. *See id.* ¶¶ 27-29.

These data are presented in Maps A, C, and D. These maps identify the buildings that competing providers are serving with fiber facilities in each of Verizon's top-40 MSAs (identified on the maps as "CLEC-lit" buildings). Maps A provide these data from a bird's-eye view of the entire MSA; Maps C show the same data for the metropolitan portions of those MSAs; and Maps D show these data for the downtown areas in these MSAs. Exhibits 5A and 5B to the Verses/Lataille/Jordan/Reney Declaration contain the underlying data for these maps — 5B shows each of the different competing providers that have deployed fiber within each of the top-40 MSAs, as well as the number of buildings each carrier serves; 5A provides the addresses of those buildings.

Each of these sets of maps and related data show that competing providers are using fiber to connect directly to office buildings throughout the markets in which they have deployed fiber, and that there are in fact hundreds of individual buildings already connected to CLEC fiber networks, with the heaviest concentration in the areas where there is the most significant demand for high-capacity services. In the smaller MSAs, competing carriers have carefully targeted their facilities to the limited areas within those MSAs in which there is demand for high-capacity services. For example, in the Portland, Maine and Burlington, Vermont MSAs there is only one

Verizon wire center in each MSA that is within the subset of wire centers that account for 80 percent of the demand for high-capacity special access services in Verizon's region, and competing carriers have deployed fiber in each of those wire centers. *See* Verses/Lataille/Jordan/Reney Decl. ¶ 7 & Exh. 4B. The Roanoke, Virginia and Charleston, West Virginia MSAs each contains only two Verizon wire centers within the subset of wire centers that account for 80 percent of the demand for high-capacity special access services in Verizon's region, and again both wire centers in each MSA are served by competitive fiber. *See id.*

Second, Verizon obtained data that estimate the typical aggregate demand for high-capacity services in buildings served by competitive fiber. Verizon obtained this data from InfoUSA (formerly known as American Business Information or ABI), a leading provider of sales and marketing information to many different types of businesses. *See id.* ¶¶ 32-33. InfoUSA maintains a database on approximately 13 million businesses in the United States. *See id.* ¶ 33. Verizon obtained information regarding the size, nature, and address of the businesses in its top-20 MSAs. *See id.* ¶ 34. Using an industry model developed by Global Insight Inc. — a firm that provides a range of consulting and information services for many different industries — Verizon was able to use this information to estimate and correlate telecommunications demand with each individual building address in these 20 MSAs. *See id.* ¶¶ 37-43.

Exhibit 6 to the Verses/Lataille/Jordan/Reney Declaration contains a summary of this data for the top-20 MSAs. It is a chart demonstrating that competing providers have deployed fiber to the majority of buildings with high estimated telecommunications expenditures, including: 65 percent of buildings with greater than $6 million in aggregate telecommunications expenditures; 57 percent of the buildings with $4-$6 million in aggregate telecommunications expenditures; and 50 percent of the buildings with $2-$4 million in aggregate

telecommunications expenditures. These data accordingly confirm that competing providers have chosen to target buildings where high-capacity demand is concentrated.

b. The data on competitive *fiber* do not provide the full extent to which alternative loop facilities are available, because fiber is not the only technology that competing carriers can use to provide high-capacity loop services. Both fixed wireless and cable networks provide additional competition in the supply of high-capacity loops. *See 2004 Fact Report* at III-22 to III-27 & Tables 13-16, III-38 to III-40 & Table 19.

Analysts report that 40 percent of large business (1,000+ employees), 29 percent of mid-sized businesses (100-999 employees), and 23 percent of small businesses (5-99 employees) are now using fixed wireless services for at least some high-capacity services.[40] Competing providers may use fixed wireless to extend their existing fiber networks, and a number of wireline CLECs are now doing so, while other CLECs are currently experimenting with the technology. *See 2004 Fact Report* at III-24, Table 15. For example, on May 17, 2004, WilTel announced that it would use fixed wireless from Teligent to expand its networks in Tier 2 and Tier 3 markets to give customers "direct, on-net access to WilTel's robust services."[41] Another CLEC, XO, is "rolling out its fixed wireless services directly and through other carriers that would resell it to end users."[42] A number of other CLECs are using fixed wireless as well. *See*

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[40] K. Burney, *et al.*, In-Stat/MDR, *Cash Cows Say "Bye-Bye": The Future of Private Line Services in US Businesses* at 19, Tables 9 & 10 (Dec. 2003) ("*In-Stat/MDR December 2003 Study*"); *2004 Fact Report* at III-36.

[41] WilTel Communications Group, Inc. Press Release, *Teligent to Provide Wireless Service Installation, Management* (May 17, 2004).

[42] K. Henderson, *Fixed Wireless Round Two: Metro Wholesalers Step Back in the RF Ring*, Phone+ (Feb. 2004), *available at* http://www.phoneplusmag.com/articles/421carrier01.html (quoting Mark Salter, VP, broadband wireless, XO).

2004 Fact Report at III-24, Table 15. Some of them — such as XO — already own their own fixed wireless spectrum. *See id.* at III-21 & n.57.[43] Wireline CLECs also may obtain fixed wireless services from a number of third-party suppliers. *See 2004 Fact Report* at III-23, Table 14.

Each of the nation's major cable operators also is now actively pursuing large business customers. These cable operators are providing high-capacity services to business customers both by deploying fiber to office buildings, and by extending their hybrid fiber-coax networks to business districts in order to provide cable modem services to business customers. *See 2004 Fact Report* at III-36 to III-38 & Table 19. For example, Time Warner is "delivering cost effective, high capacity access solutions to several Fortune 500 customers," and in the past year has "enjoyed a $60 million gain in business sector revenue . . . boosting their overall commercial take by 70%."[44] Cox has "launched . . . a new integrated marketing campaign to inform and drive demand among Enterprise and Fortune 500 companies"; the company generated $287 million in commercial sales in 2003, and has launched a new marketing effort to "boost commercial revenue by more than 20% this year, a jump of more than $50 million."[45] Charter

[43] *See also* XO, *Network Assets*, *available at* http://www.xo.com/about/ourstory/networkassets.html (XO owns "[f]ixed wireless licenses covering 95% of the top U.S. business markets.").

[44] Time Warner Cable Commercial Services, *High Speed Internet Access*, *available at* http://www.twcbroadband.com/products/hsd.php; A. Breznick, Cable Datacom News, *Cable Operators Show They Really Mean Business* (Sept. 2004), *available at* http://www.cabledatacomnews.com/sep04/sep04-2.html.

[45] Cox Business Services Press Release, *Enterprise Presents Even "Bigger" Opportunity for Cox Business Services in 2004* (Mar. 29, 2004); Breznick, *supra. Cable Operators Show They Really Mean Business.*

cable is moving "'up-market' to compete in Enterprise RFP environment."[46] According to analysts, 41 percent of large businesses, 32 percent of mid-sized businesses, and 44 percent of small businesses were using cable modem service for at least some high-capacity services.[47]

c. As the foregoing data show, competing carriers are clearly able to serve a very large number of buildings and to serve customers within those buildings, either by deploying high-capacity facilities themselves, by leasing those facilities from an alternative provider, or by using special access. Competing carriers have nonetheless complained in the past that they may experience difficulties obtaining access to certain buildings. *See Triennial Review Order* ¶¶ 303-305. But these complaints do not withstand scrutiny as a factual matter, and in any event do not form the basis for impairment as a legal matter.

As for the facts, it is beyond dispute that competing carriers are now serving hundreds of thousands of buildings – and far greater numbers of customers within those buildings – using either their own facilities, facilities leased from alternative providers, and special access. Contrary to what competing carriers have claimed, most building owners do not limit access to a single provider.[48] In fact, the Commission has already banned exclusive access arrangements in commercial buildings, and as long as the ILEC is in a building, a CLEC has the right to use the

[46] D. Chang, EVP, Finance & Strategy, Charter Communications, presentation before the JP Morgan High Yield Conference, at 23 (Feb. 2, 2004).

[47] *See In-Stat/MDR December 2003 Study* at 19, Tables 9 & 10; *2004 Fact Report* at III-39.

[48] Moreover, a Building Owners and Managers Association survey covering roughly 2,100 commercial buildings reported that 80 percent of the respondents said they had more than one telecommunications service provider, and almost 60 percent offer their tenants a choice of three or more providers. *See* Ex Parte Filing of the Real Access Alliance, Attach. at 3, *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, WT Docket No. 99-217 & CC Docket No. 96-98 (FCC filed June 16, 2000).

ILEC's in-building risers and conduits to reach its customers.[49] Moreover, competing carriers can generally enter a new building immediately, and without securing a landlord's prior approval, by using special access from an ILEC. Competing carriers are, in fact, serving hundreds of thousands of buildings in precisely this manner. *See, e.g., 2004 Fact Report* at III-3. The competing carrier can then migrate customers to its own facilities at a later date, after it has negotiated for its own direct building access.

In any event, to the extent that some municipalities or building owners may be unwilling to negotiate reasonable access arrangements with CLECs, that is not a legitimate basis for finding impairment. For one thing, that is an issue that should be addressed directly through the legal process. As the D.C. Circuit held, where such direct solutions are available — as they are here — the Commission may not use its unwillingness or failure to pursue them as a basis for finding impairment and forcing ILECs to share their networks. *See USTA II*, 359 F.3d at 571. For another thing, this is not an issue that is unique to CLECs, but instead is an issue that an ILEC would confront as well when they seek to enter a new building. Thus, this is not a cost "related to structural impediments to competition" that are "linked (in some degree) to natural monopoly," and therefore may not be considered in the impairment analysis *Id.* at 572.

3. Competitors Are Capable of and Are Using Special Access To Compete Successfully

Although competing providers are relying heavily on their own or alternative facilities to provide high-capacity services, they also are extending the reach of those facilities by using special access services purchased from ILECs. Competing providers are in fact using special

[49] *See* 47 C.F.R. § 64.2500; First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order, *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000).